1982

State of Utah v. Charles Kermit Lesley : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 18038
vs.	:	
CHARLES KERMIT LESLEY,	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

Appeal from the judgment and conviction rendered by the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, Judge presiding.

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of Production of a Controlled Substance (marijuana), a felony, Utah Code Annotated §58-37-8 (1953 as amended), and Criminal Trespass, a Class "C" Misdemeanor, Utah Code Annotated §76-6-206 (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, Judge presiding.

DISPOSITION IN THE LOWER COURT

Appellant, Charles Kermit Lesley, was charged in a two count information with Production of a Controlled Substance (marijuana), a felony, Utah Code Annotated §58-37-8, and Criminal Trespass, a Class "C" Misdemeanor, Utah Code Annotated §76-6-206. On August 17, 1981, he was convicted by a jury of both charges. On September 23, 1981, the appellant was sentenced to serve a term not to exceed five years and a $900.00

fine and a term not to exceed 90 days and a $299.00 fine, sentences to run concurrently. Execution of sentence was stayed and appellant was placed on probation subject to payment of $1,199.00 in fines and other probation conditions.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment of guilt entered against him as to Count I with orders to the trial court to dismiss, or grant a new trial. Appellant seeks reversal of the judgment of guilt entered against him as to Count II, with orders to the trial court to dismiss with prejudice.

STATEMENT OF THE FACTS

On February 16, 1981, attorney for the defendant Charles Kermit Lesley, filed a motion to suppress evidence. Record on Appeal, page 12. The memorandum in support of that motion contended that the arresting officer did not have probable cause to arrest defendant and that the search following the illegal arrest was in violation of defendant's Constitutional rights prohibiting unreasonable searches and seizures. R. 13-18. That motion was denied and the evidence was admitted at trial.

The facts adduced at trial from various witnesses are as follows: On the morning of August 21, 1980, Forest Service employee Eugene Lowin accompanied Narcotics Detective Steve Alexander and approximately ten local law enforcement officers to an area in Red Butte Canyon where marijuana was growing. The purpose for this expedition was to seize items in connection with the marijuana farm in an attempt to locate the parties responsible for its production. R. 115.

Eugene Lowin testified that there was a road leading up toward the compound area where the marijuana was growing. He also stated that only the first of three locked gates across the road was posted "No Trespassing". Lowin also responded that it was possible to enter on foot and not see the signs on the first gate. R. 14-15.

Dectective Alexander testified that upon his arrival, he noticed a person in or near the compound where the marijuana was growing. R. 117. That sighting was made by him from a distance of about one-quarter mile, without the use of binoculars. R. 138. Following a search of the area, an individual was arrested, that person being the defendant-appellant, Charles Kermit Lesley.

The time of arrest is not clear, and portions of the testimony of Lowin and Alexander are in conflict. Lowin testified that he did not see anyone that day other than officers until he saw Mr. Lesley being accompanied to the compound by sheriff's officer. R. 110. He advised the officer at that time that Lesley was trespassing. R. 101.

Alexander testified that he asked Lowin if Lesley was trespassing. R. 119. Later, on cross examination, Alexander states that he found Lesley some fifty yards from the compound and arrested him, stating to the court "I just found out he was trespassing and arrested him." R. 141. Alexander further states that upon finding Lesley and inquiring of his presence, Lesley stated he was just hiking. R. 141-142.

Near the close of the first day of trial, counsel for defendant Lesley moved for a mistrial on the ground that one of the jurors had been dozing throughout the trial. The motion was denied. R. 191.

The trial court's instructions were presented to the jury with no objection as to their substances from either counsel. R. 213.

Appellant was convicted by a jury of the crimes of Production of a Controlled Substance and Criminal Trespass, as charged in the Information, and judgment was entered thereon. Appellant now takes this appeal from judgment of the trial court.

POINT I

THE TRIAL COURT'S INSTRUCTION REGARDING THE FINDING OF INTENT TO COMMIT THE FELONY OF PRODUCTION OF A CONTROLLED SUBSTANCES WAS PREJUDICIAL ERROR.

The appellant asserts that the trial court erred in its instruction to the jury regarding the elements necessary to convict the defendant of Criminal Trespass. The entire instruction was given as set forth below:

INSTRUCTION NO. 12

> Before you can convict the defendant of the crime of Criminal Trespass, Count II, you must find from the evidence beyond a reasonable doubt, all of the following elements of that crime:
>
> 1. That on or about the 21st day of August, 1980, in Salt Lake County, State of Utah, the defendant Charles Kermit Lesley, unlawfully entered the property of the U.S. Government.

2. That at the time of said entry the defendant, Charles Kermit Lesley, intended to commit the crime of Production of a Controlled Substance.

If you believe that the evidence establishes each and all of the essential elements of the offense beyond a reasonable doubt it is your duty to convict the defendant of Criminal Trespass. On the other hand, if the evidence has failed to so establish one or more of said elements, then you must find the defendant not guilty.

Appellant's appeal of this issue is allowable to prevent manifest injustice, pursuant to Rule 19(c), Utah Code of Criminal Procedure. Utah Code Annotated §77-35-19(c), (Supp. 1981).

A. INTENT TO COMMIT A FELONY IS NOT AN ELEMENT OF CRIMINAL TRESPASS.

The defendant was charged in Count II of the Information with Criminal Trespass, a Class "C" Misdemeanor, a violation of Utah Code Annotated §77-6-206 (1953 as amended).

This charge arose from allegations (to the effect) that the appellant entered the property of the United States Government with intent to commit the crime of Production of a Controlled Substance.[1]

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1. In assessing the substance and sufficiency of this charge, it is necessary to compare and consider the Criminal Trespass statute with the felony counterpart, Utah Code Annotated §76-6-202 (1953 as amended).

(Footnote 1 continued)

These two statutes, with emphasis provided to pertinent sections, are set forth below:

76-6-202. BURGLARY. (1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.

(2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

76-6-206. CRIMINAL TRESPASS. (1) For purposes of this section "enter" means intrusion of the entire body.

(2) A person is guilty of criminal trespass if, under circumstances not amounting to burglary as defined in sections 76-6-202, 76-6-203, or 76-6-204:

(a) He enters or remains unlawfully on property and:

(i) Intends to cause annoyance or injury to any person thereon or damage to any property thereon; or

(ii) Intends to commit any crime, other than theft or a felony;

(iii) Is reckless as to whether his presence will cause fear for the safety of another.

(b) Knowing his entry or presence is unlawful, he enters or remains on property as to which notice against entering is given by:

(i) Personal communication to the actor by the owner or someone with apparent authority to act for the owner; or

(ii) Fencing or other enclosure obviously designed to exclude intruders; or

(iii) Posting of signs reasonably likely to come to the attention of intruders.

(3) A violation of subsection (2)(a) is a class C misdemeanor unless it was committed in a dwelling, in which event it is a class B misdemeanor. A violation of subsection (2)(b) is an infraction.

(4) It is a defense to prosecution under this section:

(a) That the property was open to the public when the actor entered or remained; and

(b) The actor's conduct did not substantially interfere with the owner's use of the property.

At trial, the jury was correctly instructed as to the elements of Criminal Trespass, Utah Code Annotated §76-6-206(2)(a) (1953 as amended), Instruction No. 11, R.59. However, the jury was then misinstructed as to findings necessary to convict the defendant of Criminal Trespass. Instruction No. 12, supra.

The explicit language of the Criminal Trespass statute, subsection (2)(a)(ii), makes it clear that the accused must intend to commit a crime which is not a felony. Felonious intent is an element of burglary, not criminal trespass. To instruct a jury otherwise is to frustrate the legislative intention of the Criminal Trespass statute.

If the state wished to prosecute the appellant for his alleged unlawful entry coupled with felonious intent, it should have charged the appellant with burglary. The State's prosecution of the appellant for Criminal Trespass should be supported by evidence of intent to commit a crime other than theft or a felony, evidence which is conspiciously absent from the trial record.[2] Instead, the appellant was charged with and the jury was instructed as to an offense which borrows language from two separte statutes and fulfills the requirements of neither.

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2. Count I of the Information charges the appellant with the following:
PRODUCTION OF A CONTROLLED SUBSTANCE, a Felony, at Red Butte Canyon, on or about August 21, 1980, in violation of Title 58, Chapter 37, Section 8(1)(a)(i), Utah Code Annotated, 1953 as amended, in that the defendant CHARLES K. LESLEY did knowingly and intentionally produce a controlled substance, to-wit: Marijuana by means of cultivating marijuana plants;

B. ALLOWING THE DEFENDANT'S CONVICTION OF CRIMINAL TRESPASS TO STAND WOULD RESULT IN MANIFEST INJUSTICE.

The defendant in a criminal prosecution is entitled to appeal a final judgment of conviction. Utah Code Annotated §77-1-6(g) and §77-35-26(b)(1), (Supp. 1981). Generally, errors assigned with regard to jury instructions must be objected to at trial in order to be preserved as an issue upon appeal, in conformity with Rule 51, Utah Rules of Civil Procedure. See State v. Erickson, Utah, 568 P.2d 750 (1977), State v. Kazda, Utah, 545 P.2d 190 (1976). It is clear from the trial record that the appellant's trial counsel raised no objection to the substance of any instructions at trial.

Despite this general approach to appeals of jury instruction issues, the appellant asserts that this appeal is appropriately taken under the authority of Rule 19(c), Utah Rules of Criminal Procedure. Utah Code Annotated, §77-35-19(c) (Supp. 1981). This rule states:

(Footnote 2 continued)

Utah Code Annotated §58-37-8(b) provides that:

(b) Any person who violates subsection (1)(a) of this section with respect to:

(iii) A substance classified in schedule IV or marihuana shall, upon conviction, be sentenced to a term of imprisonment for not more than five years or pay a fine of not more than $5,000, or both.

(iv) A substance classified in schedule V shall, upon conviction, be sentenced to one year in the county jail or pay a fine of not more than $1,000, or both.

The evidence presented at trial was intended to show that the appellant was farming marijuana. No mention was made nor evidence presented from which the court or the jury could infer that the appellant was producing any other substance, which would be punishable as a Class A Misdemeanor under subsection (b)(iv).

> (c) No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the matter to which he objects and the ground of his objection. Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid a manifest injustice. (Emphasis Added)

This court very recently confronted the applicability of Rule 19(c) in State v. Malmrose, No. 17661, June 22, 1982. In that case the appellant claimed prejudicial error based on the trial court's failure to give an instruction regarding the inherent shortcomings of eyewitness identification. This court found such an instruction to be discretionary, and Rule 19(c) inapplicable since the "[d]efendant makes no showing of injustice". Id. at 4.

The manifest injustice in this case is readily apparent. The appellant's conviction arises from a poorly drafted information whose language was erroneously duplicated in the trial court's instructions to the jury. Furthermore, the record shows no introduction of evidence by the state of any crime not amounting to a felony which would serve to reconcile the charge with the proceedings, and therefore cure this glaring error.

Blame for this error should be shared equally by counsel for the state, trial counsel for the appellant, and the trial court itself. Appellant should not be forced to suffer the consequence of a conviction due to an "oversight" at the hands of

the those with whom he had entrusted his fate. The appellant, therefore, seeks reversal of his conviction on Count II of the Information, with orders to the trial court to dismiss with prejudice.

POINT II

DENIAL OF APPELLANT'S MOTION TO SUPPRESS WAS PREJUDICIAL ERROR.

Prior to trial, counsel for appellant had submitted a motion to suppress certain evidence which was seized from appellant at the time of his arrest. The motion was based on the assertion that Detective Alexander did not have probable cause to arrest the appellant and the search incident to an illegal arrest was in violation of Article I, Section 14 of the Utah Constitution and the Fourth and Fourteenth Amendments to the United States Constitution. The appellant asserts that denial of this motion was prejudicial error.[3]

It has long been recognized that, although arrest warrants are preferred, an officer may make an arrest without a warrant

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3. The appellant asserts that all the items which were seized concurrent to the unlawful arrest should be suppressed as evidence. Those items include: 4-P book, 11-P radio, 12-P backpack, 13-P trench coat, 18-P wallet, and 21-P rubber washers. (R. 38, 91) All the above listed items were seized from appellants person and effects absent a lawful arrest.

The appellant respectfully submits that exclusive of these suppressed items, the evidence is insufficient to sustain a conviction for production of a controlled substance. See State v. Schroff, 30 Utah 2d 125, 514 P.2d 793 (1973).

if he has "probable cause" to make the arrest. The basic standard of probable was expressed in Beck v. Ohio, 379 U.S. 89, 13 L.Ed.2d 142, 85 S.Ct. 223 (1964), and has been oft-replicated in various state court opinions. The Court, per Mr. Justice Stewart, stated the constitutionally valid arrest is one in which:

> . . . at the moment the arrest was made, the officer had probable cause sto make it - whether at the moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information was sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. 379 U.S. at 91 [Cites ommitted].

The Utah Supreme Court has adopted the essence of the Beck v. Ohio, probable cause standard. See State v. Eastmond, 499 P.2d 276 (1972), State v. Whittenback, 621 P.2d 103 (1980). The requirement of probable cause to arrest without a warrant is also reflected in the Utah Code of Criminal Procedure.[4]

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4. Utah Code Annotated §77-7-2 (Supp. 1981) states:

77-7-2. BY PEACE OFFICERS. A peace officer may make an arrest under authority of a warrant or may, without warrant, arrest a person:

(1) For a public offense committed or attempted in his presence;

(2) When he has reasonable cause to believe a felony has been committed and has reasonable cause to believe that the person arrested has committed it;

(3) When he has reasonable cause to believe the person has committed a public offense, and there is reasonable cause for believing the person may:

(a) Flee or conceal himself to avoid arrest;

(b) Destroy or conceal evidence of the commission of the offense; or

(c) Injure another person or damage property belonging to another person.

It is the position of the appellant that the arresting officer harbored a suspicion substantially less than probable cause at the time of arrest. This position is factually supported by the trial record.

First Eugene Lowin testified that only one gate was posted and that a person might enter the land without seeing the "No Trespassing" sign. (R. 102-103). Detective Alexander knew or should have known that people might be in the area without being aware of its restricted access. Secondly, the purpose of the expedition on August 21, 1980, was to confiscate items within the compound and look for evidence of the perpetrator. (R. 115). The appellant was not a suspect at the time, nor was anyone else. Finally, Detective Alexander's initial observation of someone in the compound area was made by the naked eye from approximately one-quarter mile away. (R. 138). There is no testimony regarding any observed acts of cultivation which would raise the officer's level of suspicion.

At the time the arresting officer encountered the appellant, there were no reasonable grounds to believe the appellant was a criminal offender. Despite this lack of probable cause, the officer arrested the appellant and searched his belongings in hopes of finding incriminating evidence.[5]

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5. The appellant does not contest the authority of the officer to conduct a preliminary inquiry of the type authorized by Terry v. Ohio, 392 U.S. 1 (1968) and its progeny. See State

(Footnote 5 continued)

v. Folkes, Utah 565 P.2d 1125 (1977). The appellant's view that any preliminary questioning occurred after he was under arrest and this status as a trespasser was confirmed after his return to the compound is supported by the following excerpts of trial testimony:

Defense Counsel: Now, when you got down to the scene down there, you say you had occasion to find Mr. Leslie. Where exactly did you find him, again?
Alexander: If my directions serve me right, he was about 50 yards south of the compound on the right side.
Defense Counsel: Did you have occasion to speak with him?
Alexander: Yeah, after I placed him under arrest. I just found out he was trespassing and arrested him.
Defense Counsel: So, the first thing you did was say, "You're under arrest?"
Alexander: Well, I don't recall if that was the first thing. I believe I might have turned around to Gene Lowin and asked him if this guy was trespassing.
Defense Counsel: What was the first thing you said to Mr. Leslie?
Alexander: I don't recall.

(R. 141)

* * * *

Prosecutor: Now, when you were there, you said that as you looked down into this valley where the compound area was, you saw a figure; did you?
Lowin: I didn't see a figure, no.
Prosecutor: When did you first see Mr. Leslie?
Lowin: After he was already down in the bottom.
Prosecutor: I see. And you say it was about 50 yards south of the compound area?
Lowin: I just saw a sheriff's officer bringing Mr. Leslie to the compound. That's the first time I saw him.

(R. 109-110)

* * * *

Prosecutor: At the time you observed Mr. Leslie in the area of the compound, did you advise the narcotics officers that he was trespassing?
Lowin: Yes.

(R. 101)

An arrest made without probable cause is illegal, and cannot be cured by what a subsequent search reveals.[6] The Utah Supreme Court recently considered the issue of search incident to arrest in State v. Whittenback, supra. That case involved the search and arrest of defendants at an all-night laundromat. In affirming the conviction, this court ruled that "[a]lthough the search itself precedes the arrest, the search is still incident to arrest if at the time of the search the officer had sufficient probable cause to make the arrest." 621 P.2d at 106.[7]

Mere suspicion of criminal activity is not sufficient grounds for arrest. The appellant's arrest was made in the absence of probable cause and the admission of evidence obtained as a result of that arrest was prejudicial error.

There was no justification of the search of the Appellant by Detective Alexander and the consequent search of his belongings which were the only items which could link him to the cultivation of marijuana. The case law is clear; the Motion to Suppress should have been granted and the evidence seized from the person and presence of Appellant suppressed prior to trial.

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6. See Henry v. United States, 361 U.S. 98, 4 L.Ed.2d 134, 80 S.Ct. 168 (1959) in which the Court, per Mr. Justice Douglas, found that an illegal arrest cannot be made legal on the basis of an incident search which yields contraband.

7. It should be noted that Wittenback involved preliminary questioning and observations by the arresting officer prior to the search of defendants. The instant case is one in which no Terry-type "stop and frisk" was made. However, the rule that probable cause to arrest should exist before a search is made is still applicable.

POINT III

DENIAL OF APPELLANT'S MOTION OF MISTRIAL WAS PREJUDICIAL ERROR.

Near the close of the first day of trial, defense counsel in the instant case moved for mistrial on the ground that one of the jurors was having difficulty remaining awake. The appellant asserts that in failing to grant the motion the trial court abused its discretion in such a way as to infringe upon appellant's right to trial by jury.

The Sixth Amendment[8] of the United States Constitution guarantees ". . . the right to a speedy and public trial, by an impartial jury. . . " While it is recognized that certain actions lie within the discretion of the trial judge, a clear showing that discretion has been abused allows an appellate court to reverse and order a new trial. State v. Belwood, 27 Utah 2d 214, 494 P.2d 519 (1972).

This court has not yet had the occasion to rule on the issue of whether failure to discharge a dozing juror is beyond the scope of discretion intended for the trial judge. Little reported case law exists from which guidance on this issue may be gleaned. However, the appellant cites two recent cases in support of this argument.

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8. Article I, Section 12 of the Constitution of the State of Utah is almost identical in wording.

United States v. Cameron, 464 F.2d 333 (3rd Cir. 1972), is a federal case which held that the trial court did not abuse its discretion in removing a juror who had appeared to be asleep at various times during the trial. The court stated:

> We have no doubt that a juror who cannot remain awake during much of the trial is unable to perform his duty, and that the Court did not abuse its discretion in removing the juror in the circumstances presented here. 464 F.2d at 335.

People v. Dupont, New York, 444 N.Y.S.2d 40 (1981), is another case where a sleeping juror was discharged by the court. In that case, a sua sponte determination was made by the court that because a juror had been observed sleeping, by the trial judge and other court personnel, at least six times, he was not qualified to serve further. In its brief analysis of the issue, the court described the type of incapacity which might justify disqualification of a juror, stating:

> In People ex rel. Moore v. Fay, 238 F. Supp. 1005, 1007, Judge Edward Weinfeld of the United States District Court stated:
>
> > 'The dereliction must be such that it may be said to deprive the parties of the continued objective and disinterested judgment of the juror, thereby foreclosing a fundamentally fair trial.'
> > (Cited by Mr. Justice Harold Birns in People v. Phillips, 87 Misc.2d 613, 626, 384 N.Y.S.2d 906)
>
> It is apparent that this juror, not having heard all of the evidence, does not have the capacity to serve in this case and is therefore 'grossly unqualified' by reason of such misconduct. 444 N.Y.S.2d at 41.

These cases represent somewhat the converse of appellant's claim; nevertheless, they do lend support to the position that allowing an unqualified juror to continue to serve forecloses appellant's right to a fundamentally fair trial.

It should be noted that the trial court was aware of the potential problem prior to the motion for mistrial,[9] as suggested by this brief dialogue:

> THE COURT: Before we proceed further, Mr. Kilpack, I'm not trying to single you out particularly, but did I understand you correctly this morning when we were empaneling the jury, that you had been up all night?
>
> JUROR KILPACK: Yes.
>
> THE COURT: In the interest of, No. 1, I suppose you getting some sleep, but more importantly, your ability to remain awake during the proceedings, I think maybe we better recess. I noticed that you have been having trouble keeping your eyes open.
>
> JUROR KILPACK: I have been doing my best.
>
> THE COURT: I understand that. I am not criticizing, but I understand the circumstances, and I don't think we better continue on today.
> (R. 189)

It is urged by the appellant that the trial court has discretion in determining the course of proceeding at trial. U.C.A. §77-35-17(h) provides:

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9. The position that the appellant should be foreclosed from raising this issue because he was aware that Mr. Kilpack had had little sleep is untenable. Counsel at trial accepted in good faith Mr. Kilpack's oath to uphold his responsibilities as a juror. His failure to do so, regardless of the circumstances, present legitimate grounds for examination of this issue.

> (h) If a juror becomes ill, disabled or disqualified during trial and an alternate juror has been slected, the case shall proceed using the alternate juror. If no alternate has been selected, the parties may stipulate to proceed with the number of jurors remaining. Otherwise, the jury shall be discharged and a new trial ordered.

This subsection allows for a trial to continue even when unforeseen circumstances arise which result in loss of one of the jurors. By mutual agreement of the parties, the trial may continue without the disqualified juror or an alternate. However, if not agreement is reached, the entire jury is to be discharged and a new trial ordered.

In the instant case, the fact that the trial court chose not to remove juror Kilpack does not rehabilitate him as a qualified juror. It is well within the limits of justice for a defendant to move for mistrial when it is clear that his case is not being attended to by the full membership of the jury to which he is entitled.

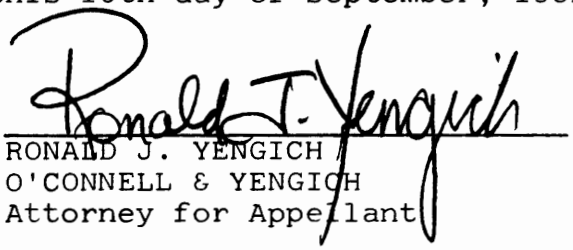
The appellant submits that the trial court abused its discretion by allowing an obviously unqualified juror to remain on the jury. In light of this occurrence, the motion for mistrial was timely and refusal to grant it was error.

CONCLUSION

For the foregoing reasons, the appellant respectfully requests that the judgment and conviction be reversed and the

case be remanded to the District Court for dismissal of Count II, and dismissal of Count I, or alternatively, a new trial.

RESPECTFULLY SUBMITTED this 10th day of September, 1982.



RONALD J. YENGICH
O'CONNELL & YENGICH
Attorney for Appellant

CERTIFICATE OF DELIVERY

I DO HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellant was hand-delivered to the office of the Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114 this 10th day of September, 1982.